

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CELL THERAPEUTICS, INC.,

Plaintiff,

v.

THE LASH GROUP, INC., et al.

Defendants.

CASE NO. C07-0310JLR

ORDER

I. INTRODUCTION

Before the court are Plaintiff Cell Therapeutics, Inc.’s (“CTI”) motions for leave to file certain documents under seal (Dkt. # 179) and motion for a protective order (Dkt. # 181). Defendant The Lash Group, Inc. (“Lash”) opposes CTI’s motion for a protective order (*see* Dkt. ## 200, 201), but has filed no opposition to CTI’s motion to file certain documents under seal. Having considered the parties’ submissions with regard to the foregoing motions, the court GRANTS both motions (Dkt. ## 179, 181).

II. BACKGROUND

The motions before the court involve a 2001 memorandum from Nixon Peabody, LLP containing attorney-client privileged communications to CTI. In an April 26, 2006 letter, the government referenced this memorandum in a letter to CTI's counsel with regard to a qui tam action pending at that time against CTI. (Second Calfo Decl. (Dkt # 205) Ex. 1.) Counsel for CTI responded in a letter dated April 28, 2006, stating that the memorandum had been identified on a privilege log, and that CTI was not prepared to waive the attorney-client privilege or to provide a copy to the government. (*Id.*) The underlying qui tam action was settled a year later in April 2007. (Reply (Dkt. # 204) at 5 n.3.)

In the spring of 2008, prior counsel to CTI learned for the first time that one of CTI's former employees, James Marchese, had provided a copy of the privileged memorandum to both the government and to Lash without authorization from CTI. (Reply at 2; *see also* Myers Decl. (Dkt. # 201) Ex. C.) CTI's national sales manager had provided a copy of the memorandum to Mr. Marchese so that Mr. Marchese could assist him in understanding the document. (Calfo Decl. (Dkt. ## 180 (sealed), 182 (redacted)) Ex. 2.) At the time, Mr. Marchese was working as a "Specialist" on CTI's reimbursement policies and strategies (a subject of the memorandum). (*Id.*)

During an April 2008 Federal Rule of Civil Procedure 37 conference, counsel for CTI informed Lash that CTI did not sanction Mr. Marchese's disclosure of the memorandum and that the memorandum was privileged. (Calfo Decl. Ex. 3.) Nevertheless, a few weeks later, Lash marked the 2001 memorandum as an exhibit

1 during the May 16, 2008 deposition of Mr. Marchese. (*Id.*, Ex. 2.) Counsel for CTI
2 again objected on grounds of attorney-client privilege. To avoid the possibility of having
3 to depose Mr. Marchese a second time, counsel for both CTI and Lash agreed that the
4 questioning of Mr. Marchese with regard to the memorandum during the course of his
5 deposition would not constitute a waiver of CTI's attorney-client privilege. (*Id.*)

6 On June 4, 2008, counsel for CTI again requested that Lash return or destroy all
7 copies of the privileged memorandum. (Myers Decl. Ex. C.) On June 9, 2008, Lash
8 refused to return the document asserting that any privilege had been waived. (*Id.*, Ex. D.)
9 On June 19, 2008, the court entered a judgment of dismissal against CTI. (Dkt. # 94.)

10 An appeal followed, and on January 22, 2010, the mandate from the Ninth Circuit
11 was entered. (Dkt. # 118.) During this period, CTI's counsel changed a number of times.
12 (*See* Dkt. ## 103, 113.) CTI's present counsel entered the action in January 2011, and
13 brought the present motion for protective order on March 25, 2011, within the time
14 period allowed for discovery motions. (*See* Scheduling Order (Dkt. # 142).)

15 III. ANALYSIS

16 CTI bears the burden of proving the attorney-client privilege exists with regard to
17 the memorandum and that the privilege has not been waived. *United States v. Richey*,
18 632 F.3d 559, 566 (9th Cir. 2011). The parties do not dispute that the memorandum
19 contains attorney-client communications. The dispute centers on whether or not the
20 privilege has been waived. (*See* Resp. (Dkt. # 200) at 7 (“... Lash only contests ... that
21 the privilege has not been waived.”).)
22

1 CTI's disclosure of the document to Mr. Marchese during the course of his
2 employment at CTI did not waive the privilege. Here, Mr. Marchese testified that he was
3 provided the document by CTI's national sales manager because the manager needed Mr.
4 Marchese's assistance in understanding the document, and Mr. Marchese was working as
5 a "Specialist" with regard to a subject matter covered by the memorandum. "A
6 corporation does not waive its privilege when non-lawyer employees send or receive
7 communications because corporate communications which are shared with those having
8 need to know of the communications are confidential for purposes of the attorney-client
9 privilege." *Deel v. Bank of Am., N.A.*, 227 F.R.D. 456, 460 (W.D. Va. 2005); *see also*
10 *SMC Corp. v. Xerox Corp.*, 70 F.R.D. 508, 518 (D. Conn. 1976) ("A privileged
11 communication should not lose its protection if an executive relays legal advice to
12 another who shares responsibility for the subject matter underlying the consultation.").

13 In addition, Mr. Marchese's disclosures of the document to the government in the
14 context of the qui tam action or to Lash in the context of this litigation also did not waive
15 CTI's privilege. Mr. Marchese had no authority from CTI to make the disclosures.
16 "[T]he power to waive the corporate attorney-client privilege rests with the corporation's
17 management and is normally exercised by its officers and directors." *Commodity Futures*
18 *Trading Comm'n v. Weintraub*, 471 U.S. 343, 348 (1985). "Since a corporate employee
19 cannot waive the corporation's privilege, that same individual as an ex-employee cannot
20 do so." *See United States v. Chen*, 99 F.3d 1495, 1502 (9th Cir. 1996) (holding that a
21 former employee's disclosures of attorney-client communications could not and did not
22 waive the privilege). Indeed, Lash does not assert that CTI's initial disclosure of the

1 document to Mr. Marchese or Mr. Marchese's disclosures to the government or to Lash
2 resulted in any waiver of CTI's privilege. (*See generally* Resp.)

3 Lash asserts that CTI waived its attorney-client privilege "by failing to protect the
4 [m]emorandum for years after it knew the [m]emorandum [had been] disclosed to third
5 parties. . . ." (*Id.* at 8.) "In cases involving the 'inadvertent' disclosure of privileged
6 attorney-client information, courts in the Ninth Circuit apply the totality of the
7 circumstances approach." *United States v. SDI Future Health, Inc.*, 464 F. Supp. 2d
8 1027, 1045 (D. Nev. 2006) (citing *United States ex rel. Bagley v. TRW, Inc.*, 204 F.R.D.
9 170, 177 (C.D. Cal. 2001)). Under this approach, courts consider (1) the reasonableness
10 of the precautions to prevent inadvertent disclosure, (2) the time taken to rectify the error,
11 (3) the scope of discovery, (4) the extent of the disclosure, and (5) the "overriding issue
12 of fairness." *SDI Future Health*, 464 F. Supp. 2d at 1045. In this case, the disclosure
13 was involuntary on the part of CTI, rather than inadvertent. The key factors, therefore,
14 relate to CTI's efforts to protect its privilege following disclosure, and the overriding
15 issue of fairness. *Id.* (citing *United States v. de la Jara*, 973 F.2d 746 (9th Cir. 1992)).

16 Lash relies primarily on *de la Jara*. (Resp. at 8-9.) However, this decision is
17 inapposite. In *de la Jara*, a letter to a defendant from his attorney was seized by police
18 officers during the execution of a warrant. 973 F.2d at 748. Following the seizure, the
19 court held that the defendant had waived the attorney-client privilege as it pertained to the
20 letter because he "did *nothing* to recover the letter or protect its confidentiality during the
21 six months between its seizure and introduction into evidence." *Id.* at 750 (*italics added*).
22 Here, it cannot be said that CTI did nothing to protect the confidentiality of the

1 memorandum at issue. To the contrary, in April 2006, CTI informed the government that
2 the memorandum was privileged and that it did not intend to waive the privilege.
3 Although CTI learned in the spring of 2008 the Mr. Marchese had provided a copy of the
4 memorandum to the government, there is no evidence on the record before this court that
5 the government ever disputed CTI's April 2006 assertion of privilege or ever used the
6 document. As noted above, the qui tam action was settled in April 2007 – before CTI
7 learned that the government had acquired a copy of the memorandum.

8 Further, once CTI learned that Lash had acquired a copy of the memorandum, CTI
9 promptly asserted the privilege during an April 2008 Federal Rule of Civil Procedure 37
10 conference with Lash. When Lash nevertheless attempted to introduce the document into
11 Mr. Marchese's May 2008 deposition, CTI secured Lash's agreement that the use of the
12 document during the deposition would not be considered a waiver of the privilege until
13 such time as the parties could resolve the issue with the court. Following the Marchese
14 deposition, in early June 2008, CTI again asserted the attorney-client privilege to Lash,
15 and requested that Lash return or destroy all copies of the memorandum. Lash refused,
16 but less than two weeks later the district court entered a judgment of dismissal against
17 CTI. (Dkt. # 94.)

18 The issue lay dormant while an appeal to the Ninth Circuit ensued. The court's
19 order of dismissal was reversed and remanded by the Ninth Circuit, and the Ninth
20 Circuit's mandate was entered on January 22, 2010. (Dkt. # 118.) Despite the remand in
21 January 2010, CTI did not move for a protective order with regard to the memorandum
22 until more than one year later on March 25, 2011. (Dkt. # 181.) It is this period of

1 inactivity with regard to CTI's assertion of privilege which constitutes Lash's strongest
2 evidence of waiver. Nevertheless, there is no evidence that Lash attempted to use the
3 document during this period of time. Further, unlike *de la Jara*, CTI was not silent on the
4 issue of privilege. Lash could not reasonably assert that it was unaware of CTI's claim of
5 privilege with regard to the memorandum.

6 The court further notes that CTI's counsel has changed a number of times during
7 the course of this litigation. (*See, e.g.*, Dkt. ## 103, 113.) While a change of counsel
8 does not excuse a delay in moving for a protective order, the court is hesitant to find a
9 waiver of CTI's attorney-client privilege based at least in part on counsel's apparent
10 inability to transition the case and all its details smoothly from one law firm or lawyer to
11 another. The court also notes that CTI's present counsel did promptly raise the issue
12 shortly following his initial involvement in the litigation. (Reply at 3.)

13 The court finds that, in the circumstances of this litigation, the efforts that CTI has
14 taken to protect its privilege with regard to the memorandum following Mr. Marchese
15 unauthorized disclosure are reasonable. CTI has repeatedly asserted privilege with regard
16 to the memorandum and requested that all copies be returned or destroyed. In addition,
17 CTI has moved for a protective order. While the time it took CTI to seek judicial
18 intervention has been long, in light of the intervening appeal to the Ninth Circuit, along
19 with CTI's changes in counsel, the court does not find the length of time to be
20 unreasonable. Considering the facts present here, overriding issues of fairness persuade
21 the court that CTI has not waived its attorney-client privilege with regard to the
22 memorandum. *See, e.g. SDI Future Health*, 464 F. Supp. 2d at 1044 (privilege not

1 waived as to documents seized during execution of search warrant when defendants
2 specifically identified the documents as privileged and requested their return within one
3 month of seizure, even though defendants failed to seek judicial action until three years
4 later). Accordingly, the court GRANTS CTI's motion for a protective order. (Dkt. #
5 181), and precludes use of the memorandum at trial.

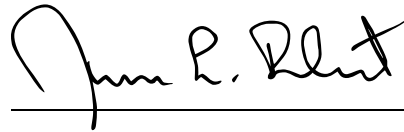
6 In addition, CTI has moved to seal certain documents it filed in connection with its
7 motion for a protective order. (*See* Dkt. ## 179, 180.) Pursuant to Western District of
8 Washington Local Rules CR 5(g)(2), the court may, for "good cause under [Federal] Rule
9 [of Civil Procedure] 26(c)" seal a document attached to a nondispositive motion, or seal a
10 document attached to a dispositive motion upon a "compelling showing that the public's
11 right of access is outweighed by the interests of the public and the parties in protecting
12 the court's files from public review." Local Rules W.D. Wash. CR 5(g)(2). Similarly,
13 the Ninth Circuit has held that "compelling reasons" must be shown to seal judicial
14 records attached to a dispositive motion. *Kakakama v. City and Cnty. of Honolulu*, 447
15 F.3d 1172, 1179 (9th Cir. 2006). The court finds that CTI has met the standards recited
16 above for sealing because the documents at issue contain attorney-client communications.
17 Accordingly, the court GRANTS CTI's motion for an order sealing these documents
18 from public view. (Dkt. # 179).

19 IV. CONCLUSION

20 Based on the foregoing, the court GRANTS CTI's motion for a protective order
21 (Dkt. # 181) concerning the attorney-client memorandum at issue here, and precludes its
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1 use at trial. In addition, the court the court GRANTS CTI's motion to seal (Dkt. # 179),
2 and directs the clerk to maintain the seal on docket number 180.

3 Dated this 18th day of May, 2011.

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7 JAMES L. ROBART
8 United States District Judge
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